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No. 960

In the Supreme Court of the United States

OCTOBER TERM, 1960

MELQUIADES DE JESUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 45–52) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1961 (Pet. 53). The petition for a writ of certiorari was filed on May 11, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction.

2. Whether transportation of lottery tickets and prize lists between New York City and Puerto Rico is interstate commerce within the meaning of 18 U.S.C. 10 and 1301.

STATUTES INVOLVED

18 U.S.C. 1301:

> Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both.

18 U.S.C. 2:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punisnable as a principal.

18 U.S.C. 10 provides in pertinent part:

> The term "interstate commerce", as used in this title, includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia.

* * * * *

48 U.S.C. 734 provides in pertinent part:

> The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws * * *.

STATEMENT

Petitioner, having waived a jury trial, was convicted by the United States District Court for the Southern District of New York on all counts of a nine-count indictment charging conspiracy, participation in the transportation of lottery tickets and prize lists in interstate commerce, and knowing receipt of such tickets and lists, in violation of 18 U.S.C. 371 and 1301 (R. 1a–7a; 140a–141a). He was given a suspended sentence of one year and one day and placed on probation for five years on the conspiracy count, and fined $250 on each of the remaining counts (R. 140a, 141a). On appeal to the Court of Appeals for the Second Circuit, the conviction was unanimously affirmed (Pet. 45–53, R. 144a–151a).

At the trial, the chief witness for the government was Gilberto Roderiguez who testified that, when he was in New York City in early December 1959, he met one Figueroa in a New York bar and asked

him whether he bought "tickets" (R. 86a–87a). Figueroa gave him the telephone number of petitioner as a person who might be interested (R. 87a). When they met, petitioner told Roderiguez that he was interested in buying Puerto Rican lottery tickets and agreed to pay Roderiguez $16.50 each for 400 lottery tickets (R. 61a–62a). Petitioner told Roderiguez that he would place larger orders if Roderiguez were able to supply him with lists of winning tickets earlier than he had been receiving them (R. 62a). Roderiguez assured him that he could do so because he was going back to Puerto Rico that day or two or three days later (R. 62a).

Roderiguez returned to Puerto Rico where he bought four hundred tickets for the December 27 drawing, placed them in a carton, and air-shipped them to himself in New York City (R. 63a–66a). He returned to New York by air, picked up the tickets, and arranged a meeting with petitioner (R. 66a). Petitioner paid Roderiguez $6,600 in cash for the tickets and ordered 400 more for the drawing of January 3, 1960 (R. 67a; 69a–70a). Roderiguez filled this order in the same manner as the first, including with it thirty-five lists of the winning tickets in earlier drawings (R. 70a–72a). Petitioner paid him for this shipment by giving him $445 in cash plus winning lottery tickets worth $6,145 (R. 73a). He then ordered six hundred tickets for the drawing of January 17 (R. 73a).

Roderiguez then returned to Puerto Rico and purchased the 600 tickets, paying for them with the winning tickets he had received from petitioner plus

$2,855 in cash (R. 73a–74a). Roderiguez arranged to ship them to New York City, and himself flew back to New York where he called petitioner and said that he expected to receive the "merchandise" that day (R. 75a–77a). Roderiguez was arrested by F.B.I. agents before he was able to make the delivery to petitioner and was subsequently convicted in Puerto Rico for violation of the federal lottery laws (R. 55a–56a; 77a–78a).

F.B.I. and customs agents testified that on January 7, 1960, at the International Airport in Puerto Rico, they intercepted two cartons containing six hundred Puerto Rican lottery tickets for the drawing of January 17, 1960, addressed to a Roderiguez in New York City (R. 25a–29a; 46a–47a; 91a). The agents removed all save one ticket, filled the remaining space in the boxes with paper, and allowed the boxes to be shipped to New York (R. 38a–39a). In New York, the following day, an F.B.I. agent followed a delivery truck carrying the package to an apartment on 172nd Street in New York City (R. 50a–51a; 53a–54a). The agent was admitted to the apartment by Roderiguez's mother (R. 50a; 77a–78a) and found the cartons containing the lottery ticket (R. 51a). Roderiguez was placed under arrest when he returned to the apartment (R. 77a).

On Wednesday, January 20, 1960, F.B.I. agents, in a search of petitioner's house pursuant to a search warrant, found Puerto Rican lottery tickets for the drawings of various dates (R. 100a–102a).[1] Lists of

[1] The tickets and lists were found secreted in a Rotobroiler, a bread drawer, and under a bedroom night table (R. 101a–104a).

winning tickets for the drawing of January 17 were also found (R. 101a–102a). Petitioner, who had been placed under arrest, told the agents that more lists and tickets would have been found had the arrest been made on Monday or Thursday (R. 104a; 107a). Petitioner admitted to the agents that he had sold lottery tickets, but denied that he had transported them in interstate commerce (R. 104a).

Petitioner offered as his sole witness Figueroa, who Roderiguez testified had put him in touch with petitioner (R. 116a). Figueroa testified that Roderiguez, whom he had known as Cajigas in Puerto Rico, visited him in New York early in December to discuss "some business". The witness said that he had asked petitioner to join them to discuss the business, and that Cajigas had told petitioner that he could get a good price on lottery tickets, but that petitioner had responded that he was not interested (R. 102a–121a). According to Figueroa, petitioner and Cajigas then discussed the purchase of petitioner's automobile by Cajigas (R. 121a).

ARGUMENT

1. a. Petitioner's general attack upon the sufficiency of the evidence is without merit. Although Roderiguez was an accomplice, his testimony alone was sufficient to sustain the judgment of conviction. *Caminetti* v. *United States*, 242 U.S. 470, 495; *Wolf* v. *United States*, 283 Fed. 885, 888 (C.A. 7), certiorari denied, 260 U.S. 743; *Hollis* v. *United States*, 246 Fed. 832 (C.A. 5), certiorari denied, 246 U.S. 672. In addition, petitioner's statements to the F.B.I. agents that he sold lottery tickets, coupled with the finding at his

house of tickets for the dates for which Roderiguez testified that he sold tickets to petitioner,[2] constituted corroboration of Roderiguez's testimony. Together, this evidence could properly be found to establish petitioner's guilt.[3]

b. Specifically, as to count one charging conspiracy, petitioner argues that the transactions with Roderiguez amounted to no more than arrangements for the purchase in New York of lottery tickets (Pet. 21–23). On the contrary, the totality of petitioner's conduct supports the charge of a scheme to receive and transport lottery tickets and lists in interstate commerce. Petitioner repeatedly urged Roderiguez to bring him lists of winning tickets and agreed to place further orders if the lists were delivered to him earlier than anybody else was receiving them. The

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[2] The record does not support petitioner's claim (Pet. 19) that there was no evidence at the trial to show that he was the occupant of 1172 Burnett Street in the Bronx where he was arrested, and at which the lottery tickets and lists were found. Roderiguez testified that he went to the same premises with petitioner when he delivered the tickets and lists to him (R. 67a, 72a), and there was a stipulation that the telephone number at which both Roderiguez and Figueroa reached petitioner was shown by telephone company records to be an unlisted number at that address (R. 107a–108a).

[3] Petitioner claims that there was no competent testimony to show that Puerto Rico operates a lottery (Pet. 16–17). Although the testimony of F.B.I. Agent O'Brien (R. 17a–24a), an experienced agent detailed to Puerto Rico, was competent proof that the lottery existed, it was not necessary to prove the existence of the lottery since the statute makes it unlawful to transport in interstate commerce paper which purports to be dependent upon a lottery, and it is not necessary that the ticket in fact be a bona fide lottery ticket so long as it purports to be such.

evidence showed an informed and interested cooperation between petitioner and Roderiguez in an interstate enterprise stimulated and instigated by petitioner; these are the ingredients of a conspiracy. See *Direct Sales Co.* v. *United States*, 319 U.S. 703; *Pereira* v. *United States*, 347 U.S. 1, 11.

c. Similarly, as to counts two, four, six and nine (which charged that petitioner caused paper purporting to represent lottery tickets and winning lists to be carried in interstate commerce), the evidence of petitioner's complicity showed more than "the mere purchase of lottery tickets in New York" (Pet. 24); there was proof of an order by petitioner for lottery tickets from Puerto Rico. By ordering the tickets and the lists, with the knowledge and intent that Roderiguez would go to Puerto Rico to fill the order, petitioner procured the interstate transportation of the tickets and was guilty as a principal under 18 U.S.C. 2. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 620.

Petitioner gains no help from the fact that he did not personally transport the tickets and lists in interstate commerce. Roderiguez went to Puerto Rico in response to petitioner's order for tickets, solely for the purpose of purchasing tickets for petitioner, and shipped all the tickets he purchased to New York and turned them over to petitioner. This evidence was plainly sufficient to sustain the conviction on counts two and four. Although the last shipment of tickets, the subject of count nine, never reached petitioner (because intercepted by the F.B.I. agents), the single ticket not confiscated in Puerto Rico was

shipped from Puerto Rico to New York in attempted fulfillment of petitioner's prior order; but for that order, the prohibited shipment would not have been made. As for count six, the conviction on that charge was sustained by Roderiguez's testimony that he included the lists of winning tickets in the second shipment, and gave them to petitioner, in response to petitioner's reiterated demands for such lists (R. 62a, 68a).

d. Petitioner launches a two-pronged attack upon the sufficiency of the evidence on count eight which charged that he caused the interstate transportation of the winning lottery tickets from New York City to Puerto Rico (Pet. 27–28). He argues that his interest in the tickets ceased when he gave them to Roderiguez, and that he cannot be deemed to have procured the subsequent transportation of the tickets. The answer to this argument is that the winning tickets had exchange value in the transaction only because they could be reduced to currency if returned to Puerto Rico. Petitioner owed money to Roderiguez on the lottery transaction, and this obligation could be discharged via lottery tickets only by the return of the tickets to Puerto Rico. Hence when petitioner gave the tickets to Roderiguez in lieu of cash he caused them to be returned to Puerto Rico for conversion there into currency.

Petitioner also asserts that a "winning ticket is in no sense dependent upon the event of a lottery, the lottery already having occurred and there being no remaining element of chance" (Pet. 28). But the value of the ticket, and therefore the ticket itself,

depended upon the outcome of a lottery, even though the outcome of the lottery was already known at the time petitioner gave Roderiguez the ticket. Accordingly, its carriage in interstate commerce violated the prohibition against transportation of a "ticket * * * dependent upon the event of a lottery * * *" (18 U.S.C. 1301, *supra*, p. 2).

e. Petitioner's attack on the sufficiency of the evidence on counts three, five, and seven, charging receipt of lottery tickets and lists, is likewise insubstantial. The argument that receipt of the tickets was wholly an intrastate transaction fails in the light of the evidence that petitioner received the tickets in the original packages directly from interstate commerce (R. 67a–72a). Roderiguez's testimony that he delivered two shipments directly to petitioner, each time within three hours after he disembarked from the airplane from Puerto Rico and immediately after he claimed the shipment of tickets (R. 67a, 71a–72a), negates any contention that the tickets and lists had come to rest in Roderiguez's hands before he gave them to petitioner. From the beginning, the ultimate destination of the tickets and lists was petitioner and they were in interstate commerce until they reached him. See *Heyman* v. *Southern Railway Co.*, 203 U.S. 270, 276.

2. Petitioner argues that, as a result of the 1952 compact between the United States and Puerto Rico which conferred commonwealth status upon Puerto Rico (66 Stat. 327, 48 U.S.C. 731d Note), Puerto Rico is not a state, territory, possession or district within the meaning of 18 U.S.C. 10 (*supra*, p. 3) and, therefore, that transportation of lottery tickets between

Puerto Rico and New York City is not included in the interstate commerce forbidden by 18 U.S.C. 1301. Petitioner does not contend that 18 U.S.C. 1301 did not apply to Puerto Rico prior to 1952.* He relies simply upon the failure of the Congress to specify a "commonwealth" in its definition of interstate commerce in 18 U.S.C. 10. As the court below held (Pet. 52), the answer to this contention is that 48 U.S.C. 734 (*supra*, p. 3) provides that the statutory laws of the United States not locally inapplicable shall have the same force and effect in Puerto Rico as in the United States, unless otherwise provided; this general provision undoubtedly covers federal criminal provisions like 18 U.S.C. 1301.

The First Circuit—speaking through Judge Magruder, who also wrote the opinion below for the Second Circuit—said in *Moreno Rios* v. *United States*, 256 F. 2d 68, 71–72, in dealing with a similar claim of the inapplicability of the Narcotic Drugs Import and Export Act:

> * * * when Congress uses the term "territory", this may be meant to be synonymous only with "place" or "area", and not necessarily to indicate that Congress has in mind the niceties of language of a political scientist who might say that Puero Rico under its com-

*There is no support for petitioner's contention (Pet. 39) that the Congress could not now make such a statute applicable to transportation between Puerto Rico and the various states. *Mora* v. *Torres*, 113 F. Supp. 309 (D.P.R.), affirmed, 206 F. 2d 377 (C.A. 1), upon which petitioner relies, upheld the applicability to Puerto Rico of a federal statute enacted prior to 1952.

monwealth status has ceased to be an unincorporated "territory" of the United States.

* * * * *

If * * * the Congress originally intended to apply the Act to Puerto Rico, it would seem clear, in view of the general provision of the Federal Relations Act to the effect that the statutory laws of the United States not locally inapplicable shall have the same force and effect in Puerto Rico as in the United States, that it was not necessary for the Congress to alter specifically all outstanding statutes thereto previously applicable in order to continue their effectiveness in Puerto Rico after it became a commonwealth in 1952. * * *

See also *Detres v. Lions Bldg. Corp.*, 234 F. 2d 596, 599–600 (C.A. 7).

Similar assertions that the 1952 compact made federal laws inapplicable to Puerto Rico were rejected in *Dario Sanchez* v. *United States*, 256 F. 2d 78 (C.A. 1) (Narcotic Drug and Export Act); *Mitchell* v. *Rubio*, 139 F. Supp. 379 (D.P.R.) (the Fair Labor Standards Act); *United States* v. *Mejias*, 131 F. Supp. 957 (D.P.R.) (the Taft-Hartley Act); and *Carrion* v. *Gonzalez*, 125 F. Supp. 819 (D.P.R.) (the Smith Act).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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